STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAIN DEWAIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 242304
Genesee Circuit Court
LC No. 02-009227-FC

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; second-degree murder, MCL 750.317; armed robbery, MCL 750.529; two counts of assault with intent to commit murder, MCL 750.83; carjacking, MCL 750.529a; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, thirty to sixty years for the second-degree murder conviction, and fifteen to thirty years each for the assault, armed robbery, and carjacking convictions, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions for felony murder, assault with intent to commit murder, carjacking, and felony-firearm, but vacate his convictions and sentences for second-degree murder and armed robbery.

Defendant's convictions arise from events that took place at the Thrift City Bar in Flint, Michigan, on July 19, 2001, in which defendant, accompanied by codefendant Tramel Simpson, fired shots killing Beatrice DuBarry, and injuring Betty Asaro and Scott Mooney during the course of an alleged robbery or larceny at the bar. Afterward, defendant and Simpson fled the scene, forced Diane and Edward Jankowiak out of their car at gunpoint, and took their vehicle.

I

Defendant first argues that the prosecutor violated his due process rights under the Fifth and Fourteenth Amendments[1] by charging him with first-degree murder and armed robbery. This Court reviews a prosecutor's charging decision for an abuse of discretion, which occurs

[1] US Const, Ams V and XIV.

when the prosecutor's choice was made for a reason that is unconstitutional, illegal, or ultra vires. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996), citing *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). As discussed in part IV of this opinion, we find no merit to defendant's argument that there was no evidence to support the charges of first-degree murder and armed robbery. In any event, defendant has made no showing that the prosecutor's charging decision was made for a reason that is unconstitutional, illegal, or ultra vires. *Barksdale*, *supra* at 488.

II

Next, we reject defendant's argument that he was denied a fair trial because of misconduct by the prosecutor in connection with the testimony of Officer Watson, Sergeant Eddy, and evidence relating to how the police identified defendant from a fingerprint that he left at the crime scene.

Defendant objected to only a portion of Sergeant Eddy's testimony at trial. With regard to this preserved claim of misconduct, we review the record to determine whether defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Concerning the challenged testimony that was not preserved with an objection at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first challenges Officer Watson's testimony that he saw a composite sketch of two men being circulated at the police department, and recognized one of the suspects as defendant. Defendant did not object to this testimony at trial and has failed to show that it constituted plain error. *Carines*, *supra*. Indeed, defendant does not provide any argument in support of his claim of prosecutorial misconduct in connection with this matter, nor does he cite any supporting legal authority. Therefore, he has abandoned the issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant also challenges the testimony of Sergeant Eddy, who stated that, on the day after the charged offense, Officer Watson approached him and stated that the composite sketch "looked like a person that he had arrested on a previous case." Defendant immediately objected, whereupon the trial court instructed the jury to disregard the testimony and admonished Sergeant Eddy. There is nothing in the record to indicate that the prosecutor deliberately elicited this testimony. Rather, the prosecutor sought to follow up Officer Watson's testimony to explain how the police located defendant. We are satisfied that any prejudice that arose from Sergeant Eddy's response was cured by the trial court's instruction to disregard the testimony.

Defendant further argues that he was prejudiced when the prosecutor continued to question Sergeant Eddy concerning the process of putting together a photographic lineup. In response, Sergeant Eddy testified, without objection, "we have a computer system now that has mug shots on it." Sergeant Eddy later testified, without objection, that "I had [defendant's] name come up in a prior interview" involving an unrelated complaint. We review these unpreserved matters for plain error affecting defendant's substantial rights. *Carines*, *supra*. Although Sergeant Eddy's responses alluded to prior contact between defendant and the police, the nature of this contact, or its result, was never disclosed. Also, the record indicates that the prosecutor used Sergeant Eddy's testimony in this regard only to explain the course of the investigation, not

to demonstrate that defendant was guilty of the charged crimes because of his bad character. Thus, there is no merit to defendant's claim that Sergeant Eddy's testimony implicated MRE 404(b), because it did not involve evidence of other crimes, wrongs or acts.[2] Further, had defendant objected to the foregoing testimony, a curative instruction could have eliminated any prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). For these reasons, defendant has failed to show that any error affected his substantial rights.

III

Defendant also argues that the prosecutor committed misconduct by eliciting testimony from a police officer that the bartender, Lorrie Nettleton, began crying and shaking after she saw defendant's photograph at the police station. Because defendant did not object to this testimony at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*. We reject defendant's argument that, by eliciting this testimony, the prosecutor improperly vouched for Nettleton. The testimony about Nettleton's reaction was relevant and admissible to the issue of defendant's identification. See *People v Gwinn*, 111 Mich App 223, 246; 314 NW2d 562 (1981) (finding that a police officer's "testimony about the complainant's reaction to the photograph of [the] defendant was admissible"). Furthermore, this testimony was cumulative to Nettleton's own testimony wherein she stated that she started to tremble when she viewed defendant's photograph. Finally, the officer's testimony was arguably admissible as a third-party statement of identification. MRE 801(d)(1)(C); *People v Sykes*, 229 Mich App 254, 266-267; 582 NW2d 197 (1998). Under these circumstances, plain error has not been shown.

IV

Next, defendant argues that the trial court erred by denying his motion for a directed verdict on the charges of first-degree premeditated murder, first-degree felony murder, armed robbery, and two counts of assault with intent to commit murder.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695,

[2] Defendant also asserts that testimony concerning the identification of his fingerprint, taken from a bicycle he had ridden, was improper. We note that the testimony of which he complains was brought out on cross-examination by defendant's counsel. This testimony was subsequently substantiated by an expert in fingerprint identification. Defendant fails to explain how admission of this evidence violated MRE 404(b) or otherwise constituted plain error that affected his substantial rights. We will not search for authority to sustain defendant's position. *Watson*, *supra* at 587. We find no error, let alone plain error, in this testimony.

702; 635 NW2d 491 (2001). Contrary to defendant's contention, the prosecution presented sufficient evidence to support the charge of first-degree premeditated murder.

The offense of first-degree premeditated murder shares the same elements of second-degree murder, with the additional element of premeditation. *People v Carter*, 395 Mich 434, 438; 236 NW2d 500 (1975). To convict a defendant of first-degree premeditated murder, the prosecution must show that the defendant intentionally killed the decedent and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Jolly*, *supra* at 466. Among the factors that may be considered in order to establish premeditation and deliberation are: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

In this case, the evidence established that defendant, accompanied by codefendant Simpson, walked into a bar with a loaded gun. While sitting together at the bar, the two discussed how to open the cash register and commit a robbery. Subsequently, defendant took a ten-dollar bill off a table as he and Simpson walked toward the doorway. At that point, Asaro became aware that her money was missing when another patron, Marilyn Wilson, yelled, "He took her money" and "call the cops," and then chased after defendant and Simpson. Defendant subsequently pulled out his gun and pointed it straight into Wilson's face. According to Sergeant Brown, Wilson told him that defendant said, "We're going to rob the place." After exiting the bar, defendant returned moments later, yelling, "F--- you, mother f---ers," whereupon he fired six shots, killing DuBarry and seriously injuring Asaro and Mooney. Defendant's conduct in returning to the bar after initially exiting, the words uttered upon his return, and his actions in opening fire on the patrons, viewed in a light most favorable to the prosecution, were sufficient to enable a rational jury to infer that the elements of premeditation and deliberation were established beyond a reasonable doubt.

To establish armed robbery, the prosecution must prove (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. MCL 750.529; *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Defendant presents a meritorious issue concerning whether the evidence sufficiently established the offense of armed robbery. In light of our Supreme Court's recent decision in *People v Randolph*, 466 Mich 532, 546; 648 NW2d 164 (2002), it is questionable whether a robbery was established in this case, given that the evidence showed that defendant took Asaro's money from the table as he was walking past it, that he and Simpson then exited the bar, and that it was not until after defendant reentered the bar that he began his assaultive conduct. Under these circumstances, it appears the evidence failed to show that the larcenous taking and the assault were sufficiently contemporaneous to establish a robbery under *Randolph*.

Nonetheless, we conclude that our resolution of this issue is not necessary to the disposition of this case. To the extent the evidence failed to establish a robbery, the remedy would be to vacate defendant's armed robbery conviction. Conversely, even if we were to find that the evidence could properly be viewed as establishing a robbery, it would still be necessary to vacate that conviction where it served as the predicate felony for defendant's felony murder

conviction. US Const, Am V; Const 1963, art 1, § 15; *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996); see also *People v Garcia (After Remand)*, 203 Mich App 420, 425; 513 NW2d 425 (1994), aff'd 448 Mich 442; 531 NW2d 683 (1995).

In this regard, we also conclude that any deficiency in the evidence with regard to the armed robbery conviction does not affect defendant's conviction of first-degree felony murder. Defendant was charged with felony murder based on separate theories of larceny and armed robbery, and the jury was instructed on both theories. By determining that defendant committed a murder during the perpetration of an armed robbery, the jury necessarily determined that the murder was also committed during the perpetration of a larceny. *Randolph*, *supra* at 553. Thus, although we vacate defendant's conviction of armed robbery, we affirm his conviction and sentence for first-degree felony murder.

Although not raised by the parties, because we are affirming defendant's first-degree felony murder conviction, we also vacate defendant's conviction and sentence for second-degree murder, inasmuch as both convictions stem from the death of a single victim. US Const, Am V; Const 1963, art 1, § 15; *People v John Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000).

Defendant also asserts that the evidence was insufficient to support his two convictions of assault with intent to commit murder, but advances no argument in support of this assertion. Therefore, the issue is abandoned. *Watson*, *supra* at 587. In any event, there is no merit to this issue. Defendant's conduct in reentering the bar, shouting "F--- you, mother f---ers," and then opening fire at the bar patrons, viewed most favorably to the prosecution, is sufficient to support an inference that he acted with the requisite intent to kill. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

V

Defendant argues that the trial court erred by instructing the jury on first-degree premeditated murder. This instructional issue is predicated on defendant's claim that there was insufficient evidence of premeditation to support a charge of first-degree premeditated murder. Having previously reject this argument in part IV of this opinion, we likewise reject defendant's claim of instructional error.

VI

Finally, we find no merit to defendant's claim that the trial court improperly permitted codefendant Simpson to testify before defendant's jury. As explained in *People v Hana*, 447 Mich 325, 361; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994):

> [W]hen each defendant testified before his own jury, he thereby waived his Fifth Amendment rights regarding the events in question. Thereafter, it became permissible for the prosecution to call that defendant as a witness in the trial of the codefendant. As the *Zafiro* [*v United States*, 506 US 534; 113 S Ct 933, 122 L Ed 2d 317 (1993)] Court noted, "[a] defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony

> would be prejudicial merely because the witness is also a codefendant." [*Id*. at 361.]

Because codefendant Simpson waived his right to remain silent, the prosecution was permitted to call him as a witness before defendant's jury. Contrary to what defendant argues, this did not infringe upon defendant's own right to remain silent. That right does not include the right to exclude other witnesses from testifying.

We affirm defendant's convictions for first-degree felony murder, two counts of assault with intent to commit murder, carjacking, and felony-firearm, but vacate his convictions and sentences for second-degree murder and armed robbery.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood